Ketua Setiausaha Kementerian Pertahanan Malaysia & Anor v Bumita Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO R-01 (NCVC)(W)-281–08 OF 2015
LIM YEE LAN, BADARIAH SAHAMID AND HARMINDAR SINGH JJCA
20 DECEMBER 2017

Contract — Tender — Letter of acceptance ('LOA') of tender — Whether terms of LOA constituted conditions precedent for formation of contract — Whether tenderer's failure to comply with terms of LOA negated existence of a contract and entitled party awarding the tender to revoke the LOA — Whether tenderer failed to prove both the fact it had suffered damages and the quantum of damages — Whether High Court was wrong to have awarded tenderer damages for 'preliminary works' and for future loss of profits

The appellants, through the Ministry of Defence ('MINDEF'), issued a letter of acceptance ('LOA') to the respondent accepting the latter's tender to carry out an army camp rehabilitation project. The LOA stated that pending the signing of a formal contract, the terms contained in the LOA would be binding on the parties. About a month and 20 days after the project site was handed over to the respondent, MINDEF issued the respondent a letter revoking the LOA on the grounds that, contrary to the terms of the LOA, the respondent had failed to sign and return a copy of the LOA within seven days and also failed to start work within two weeks of taking possession of the work site. The respondent sued the appellants for a declaration that the revocation of the LOA was wrongful and sought damages for losses incurred in carrying out 'preliminary works' on the site as well as for future loss of profits. The High Court granted the declaration and awarded the respondent RM10,000 for losses incurred in carrying out preliminary works and RM1.2m as loss of future profits. The High Court held that the failure to sign and return a copy of the LOA could not be a ground to revoke the LOA; that since the respondent had done some earthworks and surveys, these could be considered as 'preliminary works' and that, alternatively, the appellants by their conduct during the course of their co-ordination meetings with the respondent had waived the requirement that the respondent should commence work within two weeks of taking possession of the project site. The instant appeal was against the High Court's decision.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) The terms stipulated in the LOA, in particular in paras 4, 6 and 8 thereof, were in the nature of conditions precedent, the non-fulfillment of which would negative the existence of a binding contract between the parties and entitled the appellants to revoke the LOA. It was expressly stated in para 2 of the LOA that pending the execution of a formal agreement, the terms of the LOA were binding on the parties. The signing and returning of the LOA as stipulated in para 8 was essential to conclude a binding contract (see paras 32–34).

(2) With regard to the respondent's contention that the subsequent conduct of the appellants during the course of the co-ordination meetings between the parties could be construed as a waiver of compliance with the conditions precedent in the LOA, the court was of the view that since the issue of waiver was not pleaded in the respondent's claim, it could not be raised now (see para 35).

(3) The respondent had not adduced any credible evidence to support the claim that it had incurred expenses in undertaking earthworks and survey works which the respondent considered as 'preliminary works' on the project. SP1 had admitted in evidence that no preliminary works were undertaken on the site. There were no site diaries on the works and no information as to the number of workers on the project site. The survey plans were dated after the LOA was revoked and were clearly an 'afterthought'; there were also no invoices or receipts of payments in respect of alleged 'preliminary works'. Paragraph 4 of the LOA stipulated that the respondent could only commence work after obtaining the specified insurance policies and registration numbers under the PERKESO workers social security scheme. The respondent did not adduce evidence to show that those conditions had been complied with. The burden of proving both the fact of damage and the amount of damage was on the respondent. The High Court's award of RM10,000 as nominal damages for 'preliminary works' on the project was therefore clearly unsustainable (see paras 36–40).

(4) The award of RM1.2m to the respondent for future loss of profits was unsustainable. As the respondent failed to adduce evidence that preliminary works had even started, there was no basis for the assertion of a future loss of profits (see para 41).

[Bahasa Malaysia summary

Perayu-perayu, melalui Kementerian Pertahanan ('MINDEF'), telah mengeluarkan surat penerimaan ('LOA') kepada responden menerima tendernya untuk menjalankan projek pemulihan kem tentera. LOA itu menyatakan bahawa sementara menunggu kontrak rasmi ditandatangan, terma-terma yang terkandung di dalam LOA itu akan mengikat pihak-pihak tersebut. Lebih kurang sebulan dan 20 hari selepas tapak projek diserahkan

kepada responden, MINDEF mengeluarkan surat kepada responden membatalkan OA atas alasan bahawa, bertentangan dengan terma-terma LOA, responden telah gagal untuk menandatangan dan mengembalikan sesalinan LOA dalam tempoh tujuh hari dan juga telah gagal memulakan kerja dalam tempoh dua minggu selepas mengambil milikan tapak kerja itu. Responden telah menyaman perayu-perayu untuk deklarasi bahawa pembatalan LOA adalah salah dan memohon ganti rugi untuk kerugian yang ditanggung dalam menjalankan 'preliminary works' di tapak tersebut dan juga untuk kehilangan keuntungan masa depan. Mahkamah Tinggi telah memberikan deklarasi itu dan mengawardkan responden RM10,000 untuk kerugian yang ditanggung dalam menjalankan kerja awal dan RM2.1 juta sebagai ganti rugi keuntungan masa depan. Mahkamah Tinggi memutuskan bahawa kegagalan untuk menandatangani dan mengembalikan sesalinan OA itu bukanlah satu alasan untuk membatalkan LOA itu; bahawa oleh kerana responden telah melakukan kerja tanah dan kajian, ia boleh dianggap sebagai 'preliminary works' dan bahawa, secara alternatif, perayu-perayu melalui tingkah laku mereka sepanjang mesyuarat-mesyuarat penyelarasan mereka dengan responden telah menepikan keperluan bahawa responden hendaklah memulakan kerja dalam tempoh dua minggu selepas mengambil milikan tapak projek tersebut rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Terma-terma yang dinyatakan dalam LOA, khususnya perenggan-perenggan 4, 6 dan 8, adalah bersifat prasyarat, yang mana dengan tidak memenuhinya akan menidakkan kewujudan satu kontrak yang mengikat antara pihak-pihak dan memberi hak kepada perayu-perayu untuk membatalkan LOA itu. Ia telah dinyatakan dengan jelas dalam perenggan 2 LOA itu bahawa sementara menunggu pelaksanaan perjanjian rasmi, terma-terma LOA adalah mengikat ke atas pihak-pihak. Penandatanganan dan pengembalian LOA itu sepertimana dinyatakan dalam perenggan 8 adalah penting untuk membuat kesimpulan satu kontrak yang mengikat (lihat perenggan 32–34).

(2) Berhubung hujah responden bahawa tingkah laku perayu-perayu selanjutnya sepanjang mesyuarat-mesyuarat penyelarasan antara pihak-pihak boleh ditafsirkan sebagai satu penepian pematuhan dengan prasyarat dalam LOA itu, mahkamah berpendapat bahawa oleh kerana isu penepian tidak dipli dalam tuntutan responden, ia tidak boleh dibangkitkan sekarang (lihat perenggan 35).

(3) Responden tidak mengemukakan apa-apa keterangan yang boleh dipercayai bagi menyokong tuntutan bahawa ia telah menanggung perbelanjaan dalam menjalankan kerja tanah dan kerja kajian yang mana responden anggap sebagai 'preliminary works' kepada projek tersebut.

SP1 mengakui dalam keterangan bahawa tiada kerja awal telah dijalankan ke atas tapak itu. Pelan kajian telah bertarikh selepas LOA itu dibatalkan dan adalah jelas suatu 'afterthought'; tiada juga invois atau resit bayaran berkaitan 'preliminary works' yang dikatakan itu. Perenggan 4 LOA menyatakan bahawa responden hanya boleh memulakan kerja selepas memperoleh polisi insurans dan nombor pendaftaran yang dinyatakan di bawah skim keselamatan social pekerja PERKESO. Responden tidak mengemukakan keterangan untuk menunjukkan bahawa syarat-syarat tersebut telahpun dipatuhi. Beban untuk membuktikan kedua-dua fakta kerugian dan jumllah kerugian terletak pada responden. Award Mahkamah Tinggi sejumlah RM10,000 sebagai ganti rugi nominal untuk 'preliminary works' berhubung projek itu dengan itu jelas tidak boleh dikekalkan (lihat perenggan 36–40).

(4) Award RM1.2 juta kepada responden untuk kehilangan keuntungan masa depan tidak boleh dikekalkan. Oleh kerana responden telah gagal untuk mengemukakan keterangan bahawa kerja awal tersebut telahpun bermula, maka tiada asas untuk menegaskan terdapat kehilangan keuntungan masa depan (lihat perenggan 40).]

Notes

For a case on tender in general, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) para 7506.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1, CA (refd)

Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783, FC (refd)

Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor [2015] 2 MLJ 24; [2014] 1 LNS 1075, CA (refd)

Malayan Flour Mills Bhd v Saw Eng Chee (the administrator of the estate of Saw Cheng Chor, the deceased) & Anor [2001] 3 MLJ 69, CA (refd)

Prai Power Sdn Bhd v Malayawata Steel Bhd [2013] 1 LNS 1530, CA (refd)

Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31, CA (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Contracts Act 1950 s 5
Evidence Act 1950 ss 101, 103

Appeal from: Suit No 21 NCVC-02–07 of 2014 (High Court, Kangar)

Ahmad Terrirudin bin Mohd Salleh (Cynthia Noor Haizean bt Sulaiman with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellants. Zamri bin Ibrahim (Zamri Ibrahim & Co) for the respondent.

Badariah Sahamid JCA:

INTRODUCTION

[1] For ease of reference parties will be referred to as they were in proceedings before the High Court.

[2] This is an appeal against the decision of the learned judicial commissioner ('JC') delivered on 26 June 2015 which allowed the plaintiff's claim against the defendants in the following terms:

(a) a declaration that the a revocation of a letter of acceptance ('LOA') by the first defendant was unlawful;

(b) an award of RM10,000 in nominal damages as compensation for preliminary works; and

(c) an award of RM1.2m for future loss of profits, calculated as 20% of the contract price of RM60.5m.

BACKGROUND FACTS

[3] The plaintiff was invited by the defendants to participate in a direct negotiation tender in a project known as, 'PROJEK PEMBANGUNAN SEMULA KEM REJIMEN SEMPADAN DAN SKUADRON MEDAN JURUTERA (KEM ORAN) CHUPING, ORAN PERLIS' ('the said project').

[4] In response, the plaintiff submitted its tender which included design and price for RM62m. After negotiations between the parties, the contract price was agreed to be reduced to RM60.5m.

[5] Subsequently, the Ministry of Defence ('MINDEF'), acting for the defendants issued a letter of acceptance ('LOA') dated 22 May 2008 to the plaintiff.

The letter reads as follows:

> Dengan ini adalah diberitahu bahawa Tender tuan bagi kerja-kerja tersebut diatas berharga *RM60,500,000 (Ringgit Malaysia: ENAM PULUH JUTA LIMA RATUS RIBU SAHAJA)* telah dipersetujui, tertakluk kepada had, syarat dan perjanjian dalam Dokumen Tender yang menjadi asas Tender ini dan juga kepada surat ini.

2. Tuan akan dikehendaki melaksanakan Perjanjian Kontrak yang formal dalam sedikit masa lagi. Bagaimanapun, sehinggalah Perjanjian Kontrak yang formal itu dilaksanakan, Tender Tuan berserta Surat Setuju Terima ini akan menjadi kontrak yang sah mengikat di antara tuan dan Kerajaan.

3. Tuan dikehendaki menyatakan pilihan kaedah Bon Perlaksanaan samaada:

(i) Jaminan Bank/Bank Islam/Bank Pembangunan Malaysia Berhad (BPMB); atau

(ii) Jaminan Syarikat Kewangan; atau

(iii) Jaminan Insurans/Takaful atau

(iv) Wang Jaminan Pelaksanaan yang dikenakan potongan sebanyak sepuloh patus (10%) daripada setiap bayaran interim sehingga mencapai jumlah lima peratus (5%) Jumlah Harga Kontrak.

4. Tarikh milik tapak bina, seperti yang disebutkan dalam Syarat-syarat Kontrak, ialah pada 3 Jun 2008. Walau bagaimanapun, tuan hanya boleh memulakan kerja setelah tuan menyerahkan kepada Pegawai Penguasa perkara-perkara berikut:

(a) Polisi Insurans Tanggungan Awam (iaitu insurans terhadap bencana kepada orang-orang dan kerosakan kepada harta nilai insurans tidak kurang daripada RM2,000,000.00.

(b) Polisi Insurans Kerja RM60,500.000.

(c) Nombor-nombor pendaftaran dibawah Skim Keselamatan Sosial Pekerja (PERKESO).

[6] Amongst the conditions stated in the LOA are these: the contract price was RM60.5m; the contract period was 24 months; the date of possession of the site was 3 June 2008 and the date of completion of the said project was on 2 June 2010.

[7] The first defendant had delivered possession of the site to the plaintiff on 3 June 2008, in order that preliminary works could be commenced according to schedule.

[8] By a letter dated 23 July 2008, MINDEF had issued a letter to the plaintiff which revoked the LOA in the following terms:

2. Adalah dimaklumkan bahawa Kementerian ini memutuskan untuk membatalkan Surat Setuju Terima Tender (LOA) yang telah dikemukakan kepada Y Bhg Dato' mengenai projek pembangunan di atas berdasarkan kepada fakta-fakta berikut:

2.1 Syarikat Y Bhg Dato' gagal mematuhi syarat untuk mendatangani dan mengembalikan Surat Setuju Terima (LOA) dalam tempoh tujuh (7) hari seperti yang dinyatakan pada *para* 8 kepada surat LOA berkenaan.

2.2 Syarikat Y Bhg Dato' gagal mematuhi syarat yang ditetapkan pada *para* 6 dalam surat LOA iaitu memulakan kerja dalam tempoh 2 minggu dari tarikh milik tapak yang telah dibuat pada 2 Jun 2008.

[9] In summary, the defendants had revoked the LOA for the following reasons:

(a) that the plaintiff had failed to sign and return the LOA within seven days from the date of the LOA, as required under para 8 of the LOA; and

(b) that the plaintiff had failed to start work within two weeks from the date of possession of the site on 2 June 2008, as stipulated by para 6 of the LOA.

[10] The plaintiff brought an action against the defendants for a declaration that the revocation of the LOA was unlawful and damages for losses incurred in commencement of preliminary works on the said project as well as future loss of profits.

ISSUES BEFORE THE HIGH COURT

[11] The issues before the High Court may be summarised as follows:

(a) whether the revocation of the LOA by the first defendant was valid? and

(b) if the answer to the above is in the affirmative, whether the plaintiff is entitled to the compensation sought?

Decision of the High Court

[12] The learned JC had allowed the plaintiff's claim for a declaration that the defendant's revocation of the LOA was invalid and awarded the plaintiff nominal damages of RM10,000 for losses in respect of preliminary works as well as loss of future profit of RM1.2m, which was calculated on the basis of 20% of the contract price of RM60.5m.

[13] The grounds relied on by the learned JC are as follows:

(a) the failure of the plaintiff to comply with para 8 of the LOA which requires the plaintiff to sign and return the signed copy of the LOA to the defendant is not a ground for revocation of the LOA by the defendant. There is no express stipulation that a failure to comply with the terms of the LOA would entitle the defendant to revoke the LOA;

(b) the plaintiff had already commenced preliminary works on the project site, in that earthworks and surveys had been conducted by the plaintiff. Since para 6 of the LOA does not define what amounts to 'preliminary

works', the abovementioned works by the plaintiffs can be construed as 'preliminary works' in accordance with para 6 of the LOA;

(c) In the alternative, even if the plaintiff had failed to commence preliminary works according to the stipulated time, the defendants had by their subsequent conduct during the course of coordination meetings between the parties on 3 June 2008 and 13 June 2008, waived the requirement that the works on the site be commenced two weeks from the date possession of site was delivered to the plaintiff;

(d) in the absence of a written contract between the parties, the terms of the contract including cl 51(b)(i) cannot be used by the defendants to revoke the LOA. Thus the defendants' termination of the LOA was unlawful; and

(e) since the LOA was unlawfully terminated, the plaintiff was entitled to nominal damages of RM30,000 for losses incurred in undertaking 'preliminary works' on the said project as well as RM1.2m for future loss of profits, calculated as 20% of the contract price of RM60.5m.

THE PLAINTIFFS/RESPONDENTS' SUBMISSIONS

[14] The LOA was an acceptance by the defendants to the offer made by the plaintiffs through a direct negotiation tender. Thus there was already a subsisting binding contract between the parties that is legally enforceable. This is clearly stated in the said LOA as follows:

> Dengan ini adalah diberitahu bahawa Tender tuan bagi kerja-kerja tersebut diatas berharga RM60,500.00 (Ringgit Malaysia: ENAM PULUH JUTA LIMA RATUS RIBU SAHAJA) telah dipersetujui, tertakluk kepada had, syarat dan perjanjian dalam Dokumen Tender yang menjadi asas Tender ini dan juga kepada surat ini.
>
> Tuan akan dikehendaki melaksanakan Perjanjian Kontrak yang formal dalam sedikit masa lagi. Bagaimanapun, sehinggalah Perjanjian Kontrak yang formal dilaksanakan, Tender Tuan berserta Surat Setuju Terima Tender ini akan menjadi kontrak yang sah mengikat diantara tuan dan Kerajaan.

[15] Since the defendants had accepted the offer of the plaintiff and the acceptance had already been communicated to the plaintiff, the defendants cannot unilaterally revoke the acceptance.

In support of the above reference is made to s 5 of the Contracts Act 1950 which provides as follows:

> 5(1) A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.
>
> (2) An acceptance may be revoked at any time before the communication of the

acceptance is complete as against the acceptor, but not afterwards.

Thus the revocation of the LOA by the defendants by a letter to the plaintiff dated 23 July 2008 was invalid.

[16] The defendant's reason for revoking the acceptance viz the failure of the plaintiff to comply with para 8 of the LOA to sign and return the signed document within seven days of the date of the letter, is unsustainable. The stipulation in para 8 abovementioned was for the purpose of acknowledgment of receipt of the LOA. It was not a pre-condition to the establishment of a contract between the parties.

[17] The said project was executed through a direct negotiation tender where matters were discussed and finalised prior to the issuance of the said LOA. Acceptance was made by MINDEF with the issuance of the said LOA to the plaintiff dated 22 June 2008. The said acceptance established a binding contract between the plaintiffs and the defendants.

[18] The second reason given by the defendant for revoking the acceptance is because the plaintiff had failed to commence works on the site within two weeks from the date of the possession of the site on 2 June 2008, as required by para 6 of the said LOA which provides as follows:

> Kegagalan tuan memulakan kerja dalam tempoh dua (2) minggu dari tarikh milik tapak akan mengakibatkan pengambilan kerja tuan di bawah kontrak ditamatkan sejajar dengan Fasal 51(b)(i) Syarat-Syarat Kontrak.
>
> According to the abovementioned clause the requirement to commence work was in relation to the determination of the Plaintiff's employment under Clause 51 (b) (i) of the Syarat-Syarat Kontrak but not as a reason to revoke acceptance of the said LOA.

[19] In any event, there is evidence that the plaintiff had commenced works on the site within two weeks of possession of the site.

(a) PW1 confirmed that the plaintiff had started site survey works on 22 May 2008 which was completed on 8 June 2008. Site clearing and ground levelling works started on 10 June 2008 and was completed on 10 July 2008;

(b) PW1 and PW2 had attended the coordination meeting on 13 June 2008 and the chairman had been informed of the commencement of works. The chairman had instructed that works be continued and documents to be submitted earlier so that the said project would not be delayed; and

(c) the plaintiffs had submitted survey plans and monthly progress report No 1 as exhibits to support the plaintiff's contention that the plaintiff had commenced works on the site.

[20] The evidences of PW1, PW2 and PW3 were not challenged or refuted by the defendants, thus must be accepted as true (refer to *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31).

[21] The subsequent conduct of the defendants in delivering possession of the site to the plaintiffs on 2 June 2008, the attendance of the defendant's representative at the coordination meeting on 13 June 2008 and instruction to the plaintiff to continue with the works on the site in spite of the plaintiff's failure to sign and return the said LOA within seven days was a clear waiver of the pre-condition, if any for the plaintiff to sign and return the said LOA within the stipulated time. The defendants are therefore estopped from an insistence on strict compliance of the preconditions of the said LOA, in particular para 8.

GROUNDS OF APPEAL

[22] The defendant's grounds of appeal may be summarised as follows. The learned JC had erred in granting a declaration to the plaintiff that the revocation of the LOA was unlawful when the evidence was that the plaintiff had failed to comply with the express terms of the LOA that mandated the plaintiff to sign and return the said LOA within seven days of the date of the LOA as required under para 8 of the said LOA.

[23] The learned JC had erred in his finding that in the absence of a written contract, the defendants cannot use cl 51(b)(i) of the *Syarat-Syarat Kontrak* to revoke the LOA.

[24] The learned JC had erred in his finding that the plaintiff had commenced preliminary works on the said project and awarding nominal damages of RM10,000 for losses incurred on the said preliminary works when there was no evidence of invoices or payment for preliminary works adduced by the plaintiffs.

[25] The learned JC had erred in awarding compensation of RM 1.2m for future loss of profits when the plaintiff had failed to prove such losses.

A DECISION OF THIS COURT

[26] After careful consideration of learned counsels' oral and written submissions as well as a perusal of the appeal records, we are of the unanimous view that there are merits in this appeal. Thus we allow this appeal with costs and set aside the decision of the learned JC. The reasons for our decision are set out below.

[27] It is not disputed that the LOA upon which the plaintiff places reliance is governed by the express terms and conditions of the LOA. This is stated in para 2 which states (in Bahasa Melayu) as follows:

> 2. Tuan akan dikehendaki melaksanakan Perjanjian Kontrak yang formal dalam sedikit masa lagi. Bagaimanapun, sehinggalah Perjanjian Kontrak yang formal dilaksanakan, Tender tuan beserta SST Tender ini akan menjadi kontrak yang sah yang mengikat diantara tuan dan Kerajaan.

It is clear from the above that pending the execution of a formal agreement, parties intend to nevertheless be bound by the terms of the LOA.

[28] In addition, para 8 of the LOA provides as follows:

> Surat ini dihantar kepada tuan dalam dua (2) Salinan. Sila kembalikan Salinan asal, yang telah ditandatangani oleh tuan dan disaksikan dengan sempurna, di ruang yang berkenaan, ke pejabat ini dalam tempoh tujuh (7) hari dari tarikh surat ini.

[29] The defendant had issued the plaintiff two notices of reminder — on 26 June 2008 and 8 July 2008 to comply with para 8 abovementioned but to no avail. Thus, the failure of the plaintiff to sign and return the signed LOA to the defendant within seven days as required by para 8 of the LOA is a breach of the LOA which entitles the defendant to revoke the LOA.

[30] In addition, the plaintiff had also failed to commence works on the said project within two weeks of delivery of the site on 3 June 2008. Paragraph 4 of the LOA states as follows:

> 4. Tarikh milik tapak bina, seperti yang disebut dalam Syarat-Syarat Kontrak, ialah pada 3 Jun 2008. Walaubagaimanapun, tuan hanya boleh memulakan kerja setelah tuan menyerahkan kepada Pegawai Penguasa perkara-perkara berikut:
>
> (a) Polisi Insurans Tanggunan Awam (iaitu insurans terhadap bencana kepada orang-orang dan kerosakan kepada harta) nilai insurans tidak kurang daripada RM 2,000,000.00.
>
> (b) Polisi insurans Kerja RM 60,5000.00

(a) Nombor-nombor pendaftaran dibawah Skim Keselamatan Sosial Pekerja (PERKESO). A

[31] The failure to commence work at the appointed date is a breach of para 6 of the LOA which states as follows: B

> Kegagalan tuan memulakan kerja dalam tempoh dua (2) minggu dari tarikh milik tapak akan mengaakibatkan pengambilan kerja tuan dibawah kontrak ditamatkan sejajar dengan Fasal 51(b)(i) Syarat-Syarat Kontrak.

[32] The terms stipulated in the LOA, in particular in paras 4, 6 and 8 of the LOA are in the nature of conditions precedent, the non-fulfilment of which will negative the existence of a binding contract between the parties. Thus, the defendants were entitled to revoke the LOA (refer to *Malayan Flour Mills Bhd v Saw Eng Chee (the administrator of the estate of Saw Cheng Chor, the deceased) & Anor* [2001] 3 MLJ 69; *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783; [2000] 9 MLJ 783). C D

[33] We note that it was expressly stated in para 2 of the LOA that pending the execution of a formal agreement between the parties, the terms of the LOA would nevertheless be binding. E

[34] We are therefore of the view that the learned JC had erred in his finding that the acceptance of the LOA by the plaintiff did not allow the defendants to terminate the LOA. In addition, we are of the opinion that the signing and return of the LOA as stipulated by para 8 of the LOA was essential to conclude a binding contract. F

[35] In respect of the contention of the plaintiff that the subsequent conduct of the defendants during the course of the coordination meetings between the parties can be construed as a waiver for compliance of the conditions precedent in the LOA, we are of the view that since the issue of waiver was not pleaded in the plaintiff's claim, it cannot now be raised for our consideration. G

[36] In respect of the plaintiff's claim for damages, we find no credible evidence adduced by the plaintiff to support the contention that the plaintiff had incurred expenses in undertaking earthworks and survey works which the plaintiff submits are 'preliminary works' on the said project. H

[37] SP1 in his evidence had admitted that there were no preliminary works undertaken on the site. There were no site diaries on the works and no information as to the number of workers on the project sites. The documents tendered by the plaintiff entitled 'LAPORAN KEMAJUAN BULANAN NO 1 (BAGI TEMPOH HINGGA 13/07/2008)' at pp 100–104 of *rekod* I

rayuan, *Jld* 2(1) were unsigned in the columns designated for preparation and verification of abovementioned report. Neither was a witness who had prepared the abovementioned report called to give evidence on the report. It is trite that the burden of proof lies on the plaintiff to prove its claim (refer to ss 101 and 103 of the Evidence Act 1950).

[38] In addition, the survey plans were dated after the date of the revocation of the LOA and are clearly an 'afterthought'. There were no invoices or receipt of payments in respect of the alleged 'preliminary works'. What was adduced was merely a quotation for earthworks at the project site by Enrich Frontier Sdn Bhd dated 2 June 2008 (refer to *rekod rayuan Jld* 2(1) at p 90).

[39] In any event, para 4 of the LOA had stipulated that the plaintiff could only commence works on the site after obtaining and presenting specified insurance policies and registration numbers under the PERKESO workers social security scheme. It is not disputed that the plaintiff had not adduced any evidence that the abovementioned conditions had been complied with.

[40] It is trite and settled law that a plaintiff who brings an action to recover damages must discharge the burden of proving both the fact of damage and the amount of damage (see *Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2015] 2 MLJ 24; [2014] 1 LNS 1075). Thus the learned JC's award of RM10,000 to the plaintiff as nominal damages for preliminary works on the project is clearly unsustainable.

[41] The award of RM1.2m for future loss of profits to the plaintiff is also unsustainable in law. The amount was derived by calculating 20% of the contract price of RM60.5m as the loss of future profits. Since the plaintiff had failed to adduce evidence that preliminary works had even commenced, there is no basis for the assertion of a future loss of profits. It is not sufficient to merely submit a projected loss of profits (refer to *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1; *Prai Power Sdn Bhd v Malayawata Steel Bhd* [2013] 1 LNS 1530).

[42] In conclusion, we find merits in this appeal. We therefore allow this appeal with costs of RM20,000 to the appellants. We set aside the decision of the learned JC both on liability as well as damages.

Appeal allowed; decision of High Court set aside.

Reported by Ashok Kumar